



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 13, 1996

Ms. Christine T. Rodriguez
Staff Attorney
Legal and Compliance, MC 110-1A
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR96-2392

Dear Ms. Rodriguez:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 102352.

The Texas Department of Insurance (the "department") received an open records request for, among other things, the following information:

All proposals received by the State Board of Insurance or Texas Department of Insurance from any person or entity seeking to become a servicing carrier of either the Texas Workers' Compensation Assigned Risk Pool or its successor, the Texas Workers' Compensation Insurance Facility.

You have not raised any exceptions to required public disclosure with regard to the requested records on behalf of the department. You have requested an open records decision from this office, however, pursuant to section 552.305 of the Government Code, which authorizes governmental bodies to rely on the arguments of third parties whose property or privacy interests may be implicated by the release of the information.

In accordance with section 552.305 and the procedures established by this office in Open Records Decision No. 575 (1990), this office notified the nine insurance companies that submitted proposals to the department of the request for their information. In our letter, this office requested an explanation from each of the companies as to why portions of their respective proposals were excepted from public disclosure, with the caveat that their failure

to do so within a reasonable time would result in this office instructing the department to disclose the information.

More than two months have elapsed since this office issued its notice, and only three of the insurance companies, Liberty Mutual, ITT Hartford, and Travelers Indemnity, responded with comments. Because the remaining companies have failed to provide this office with any explanation as to why their respective proposals should not be released, we have no basis for concluding that the proposals are excepted from required public disclosure. *See* Open Records Decision No. 552 (1990). Therefore, the department must release those six proposals in their entirety.

The representatives of Liberty Mutual, ITT Hartford, and Travelers Indemnity each contend that their proposals are excepted from required public disclosure pursuant to section 552.110 of the Government Code, which excepts from required public disclosure "[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." This section protects two categories of information: (1) trade secrets, and (2) commercial or financial information.

There are six factors to be assessed in determining whether information qualifies as a trade secret.¹ This office must accept a claim that information is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5. However, where no evidence of the factors necessary to establish a trade secret claim is submitted, we cannot conclude that section 552.110 applies. Open Records Decision No. 402 (1983). In this instance, none of the three insurance companies that submitted briefs to this office demonstrated with any specificity how the six factors relate to their respective proposals. Consequently, none of the three proposals may be withheld as "trade secrets."

As noted above, however, section 552.110 also protects "commercial or financial information obtained from a person." This material is clearly commercial information. To fall within section 552.110, however, it must be "privileged or confidential by statute or judicial decision." Section 552.110 is patterned after section 552(b)(4) of the federal Freedom of Information Act, 5 U.S.C. section 552 *et. seq.* Open Records Decision Nos. 639

¹These six factors are

- 1) the extent to which the information is known outside of [the company's] business; 2) the extent to which it is known by employees and others involved in [the company's] business; 3) the extent of measures taken by [the company] to guard the secrecy of the information; 4) the value of the information to [the company] and to [its] competitors; 5) the amount of effort or money expended by [the company] in developing this information; and 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

(1996), 309 (1982), 107 (1975). The test for determining whether commercial or financial information is confidential within the meaning of section 552(b)(4) is as follows:

a commercial or financial matter is 'confidential' for purposes of the exemption if disclosure of the information is likely to have *either* of the following effects: 1) to impair the Government's ability to obtain necessary information in the future; *or* 2) to cause substantial harm to the competitive position of the person from whom the information was obtained. [Emphasis added.]

National Parks and Conservation Association v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

The governmental body that maintains requested information is in the best position to determine whether disclosure will impair its ability to obtain similar information in the future. The department has expressed no opinion on this subject.² If the second test is satisfied, the information may be withheld. The courts have held that

in order to show the likelihood of substantial competitive harm, it is not necessary to show actual competitive harm. *Actual competition and the likelihood of substantial competitive injury* is [sic] all that need be shown. [Emphasis added.]

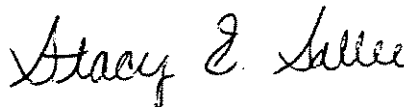
Gulf & Western Industries v. United States, 615 F.2d 527, 530 D.C. Cir. 1979); *see also National Parks and Conservation Association v. Kleppe*, 547 F.2d 673, 679 (D.C. Cir. 1976). Again, although each of the three companies responding to our notification allege the likelihood of competitive harm from the release of their proposals, they have not demonstrated why such would be the case. Conclusory and generalized allegations of competitive harm do not satisfy the requirements for non-disclosure. *See Kleppe*, 547 F.2d at 680. Because neither Liberty Mutual, ITT Hartford, nor Travelers Indemnity have met their burden under section 552.110, we conclude that the department must also release their proposals in their entirety.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue

²Liberty Mutual claims that its proposal was submitted "voluntarily," and that its release would result in a "chilling effect" that "could easily result in a less informed decision by the governmental body." We believe that the information at issue was not submitted "voluntarily," as that term is understood in this context. *See, e.g., Bangor Hydro-Elec. Co. v. United States Dep't of the Interior*, No. 94-0173-B, slip op. at 9 (D. Me. Apr. 18, 1995) (no impairment because "it is in the [submitter's] best interest to continue to supply as much information as possible" in order to secure better usage charges for its lands); *Racal-Milgo Gov't Sys. v. SBA*, 559 F. Supp. 4, 6 (D.D.C. 1981) (no impairment because "[i]t is unlikely that companies will stop competing for Government contracts if the prices contracted for are disclosed").

under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

SES/RWP/ch

Ref.: ID# 102352

Enclosures: Submitted documents

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